Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-265

JAMES W. WILLMAN,
Petitioner-Appellant,

vs.

STATE OF MINNESOTA,
Respondent-Appellee,

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

James Willman, petitioner below for post-conviction relief under the Minnesota Statute, appeals from the judgment of the Supreme Court of Minnesota, entered on May 19, 1978, affirming an order denying his petition. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 266 N.W.2d 187, and is attached hereto as Exhibit A. The opinion of the court of first instance denying the petition is attached hereto as Exhibit B. The original conviction of petitioner was reviewed by the Minnesota Supreme Court in 1973. The opinion in that case is reported at 296 Minn. 322, 208 N.W.2d 300, and is attached hereto as Exhibit C.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The proceeding is one for post-conviction relief, brought pursuant to Minnesota Statutes §§590.01-06. The judgment sought to be reviewed was entered on May 19, 1978, and is annexed hereto as Exhibit D. The Notice of Appeal was filed on August 11, 1978, in the District Court, Fourth Judicial District Hennepin County, Minnesota, and is annexed hereto as Exhibit E.

Jurisdiction to review this case by direct appeal is conferred upon this court by Title 28, United States Code, §§1257(2) and alternately 2103. The following decisions sustain the jurisdiction: *United States v. Evans*, 333 U.S. 483 (1948); *Viereck v. United States*, 318 U.S. 236 (1943); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)

The state statute involved is Minnesota Statutes §609.175, part of Minnesota's Criminal Code of 1963. When appellant was convicted, it read as follows:

"609.175 Conspiracy

Subdivision 1. To cause arrest or prosecution. Whoever conspires with another to cause a third person to be arrested or prosecuted on a criminal charge knowing the charge to be false may be sentenced to imprisoment for not more than 90 days or to payment of a fine of not more than $100.

Subd. 2. To commit crime. Whoever conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy may be sentenced as follows:

(1) If the crime intended is a misdemeanor, by a sentence to imprisonment for not more than 90 days or to payment of a fine of not more than $100; or

(2) If the crime intended is murder in the first degree or treason, to imprisonment for not more than 20 years; or

(3) If the crime intended is any other felony or a gross misdemeanor, to imprisonment or to payment of a fine of not more than one half the imprisonment or fine provided for that felony or gross misdemeanor or both.

Subd. 3. Application of section. This section applies if:

(1) The defendant in this state conspires with another outside of this state; or

(2) The defendant outside of this state conspires with another in this state; or

(3) The defendant outside of this state conspires with another outside of this state and an overt act in furtherance of the conspiracy is committed within this state by either of them. Laws 1963, c. 753."

In 1975, the following paragraph was added to Subdivision 3:

"(4) [The] defendant in this state conspires with another in this state."

QUESTION PRESENTED

In a state which has abolished common-law crimes, so that no act or omission is a crime except as made so by statute, may the courts, consistently with due process of law, so "construe" a criminal statute as to make it cover a case inadvertently omitted from the law by the legislature?

STATEMENT OF THE CASE

In 1971, James Willman conspired with another to bring about the death of his wife. Had the crime been consummated it would probably have amounted to murder in the first degree under the Minnesota law. (the facts are stated in the original opinion of the Minnesota Supreme Court. *State v. Willman*, 296 Minn. 322, 208 N.W.2d 300 [1973].) The co-conspirator changed his mind, so the crime was not carried out. Willman's conviction of conspiracy to commit first degree murder was reviewed solely as to the sufficiency of the evidence. No point concerning the applicability of the statute was raised.

In 1975, the Minnesota legislature, responding to the concern of a senator who also happened to be a policeman, remedied what it deemed to be an omission in the criminal code of 1963 by enacting Paragraph 4 of the statute, set forth above. In the words of another proponent, "Somehow or other we left a great big crack by which you can't have a conspiracy within the state."

Taking this as an authoritative statement that he had been convicted of a non-existent crime, petitioner applied to the Hennepin County District Court, the place of his original conviction, for vacation of the conviction. This was denied by the District Court on the ground that the subdivision 3 as it stood

at the time of his conviction simply "expands the jurisdiction of the court to the extraterritorial acts and agreements stated." The Minnesota Supreme Court affirmed.

THE QUESTION IS SUBSTANTIAL

A. Raising of federal question.

The petition in the court of first instance states only facts, not legal contentions. Oral argument in that court was not recorded. The opinion of the trial court makes no reference to any constitutional problem, either state or federal.

Petitioner appealed to the Supreme Court of Minnesota, raising the following two questions (Appellant's Brief p. 1):

> "Where the law of a state is such that no acts are criminal except as made so by statute, and the legislature inadvertently fails to define a certain kind of obviously wrongful conduct as a crime,
>
> (1) May the statute nevertheless be construed so as to carry out what the legislature obviously would have done but for its inadvertence?
>
> (2) Does it violate the Constitutions of Minnesota and the United States for the courts to supply the omission?"

During the pendency of the appeal, the State moved for summary affirmance on the ground that the construction of the Statute had been settled adversely to Willman in another case. Willman answered: (Exhibit F)

> "In its Motion and Memorandum, the respondent says that *State v. Happel* is 'wholly dispositive of the present case.' This is not quite true. In this case two points are raised:

1. Is the statute intended to cover conspiracies committed wholly within Minnesota?

2. If so construed, does the statute violate the constitutions of Minnesota and the United States?

"The first of these questions is answered adversely to the appellant by *Happel*. The second question has not yet been answered.

"It remains for the Court to say what the answer to the second question is. It would appear that the appropriate order to issue from these proceedings would be an order limiting the issues to the question of constitutionality."

The Court denied the motion. The opinion on the merits, Exhibit A, makes no statements responsive to appellant's constitutional contention, but simply construes the statute as one that "expand[ed] . . . the jurisdiction of this state's courts over conspiracies committed in part outside Minnesota." Since it was the heart of appellant's contention that this was the law, and the only law, *defining* the crime of conspiracy for Minnesota, and that a judicial expansion of the definition amounted to a denial of due process of law, it will readily be seen that the silence of the Minnesota Supreme Court amounts to a finding of the validity of the statute as against the constitutional attack. Cf. *Largent v. Texas*, 318 U.S. 418 (1943); *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-3 (1932).

B. The importance of the issue.

It is hard to imagine a more fundamental principle of the criminal law than the one at stake here. Indeed, a noted scholar refers to it as *the* "principle of legality." Hall, *Principles of Criminal Law*, c. 2 (1947).

The principle is compendiously expressed in the old legal maxim, "*Nullum crimen sine lege*," and probably nothing is more essential to our traditional notions of fair play and justice than that the citizen should be warned by clear, *pre-existing* language what conduct is to be deemed criminally punishable. It is a fundamental part of the concept of due process of law, as is recognized by the Supreme Court of Minnesota itself. For example:

> "Due process requires, as a matter of fundamental justice, a statute creating a crime to prescribe reasonably ascertainable standards of guilt in order that one may know in advance just what acts are required or forbidden." *State v. Bolsinger*, 221 Minn. 154, 166, 21 N.W.2d 480 (1946)

Thus, in this county we don't tolerate statutes making it a crime to engage in, say, "conduct detrimental to the welfare of the nation," a sort of prohibition the Soviet Union is so fond of. We express this by saying that due process forbids a statute to be so vague as to leave it unknowable in advance what conduct will be visited with penal consequences. This court put it well in *United States v. Reese*, 92 U.S. 214, 221 (1875):

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

The other side of the same coin is that we demand that the legislature say what it is that it means to condemn. There is a limit beyond which courts do not feel that they can constitutionally go in supplying words that the legislature didn't see fit to use. The best example of that kind of case is *United States v. Evans*, 333 U.S. 483 (1948), where it seemed obvious that Congress had intended to make it criminal either to bring into the country or to harbor therein an illegal alien, but it had failed to provide a penalty for the latter conduct. The court refused to "plug the hole in the statute."

To the same effect is *Viereck v. United States*, 318 U.S. 236 (1942), which is particularly apropos here because in that case, too, the authorities attempted to vouch in aid of their case an "amendatory" or "clarifying" (as they would have it) act passed after the conduct in question occurred. This court refused to have any part in that effort, saying:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

Viereck had been convicted of an offense not covered in the original statute, but covered in an amendatory act passed after the conduct for which he was tried. In refusing to regard the new law as merely declaratory, this court said (318 U.S. at 247):

> "The application, *ex post facto*, of the new, to impose on petitioner a duty which the words of the old plainly exclude, is not to be justified by denominating the amendment as clarifying or declaratory legislation."

The case at bar is particularly appropriate for review because a set of facts more clearly laying bare a fundamental principle would be hard to imagine. The case might almost have been invented to go into textbook on jurisprudence. An opportunity is here at hand for saying what needs to be said in terms that will be almost impossible to misunderstand.

Look at what has happened. A state that says it will not punish conduct not clearly proscribed by a written law* writes a law which, clearly through inadvertence of the lawmakers, fails to proscribe conduct which everyone recognizes as morally wrong. A man is convicted and sent to prison under it. Several years later, the legislature sees its mistake and rectifies it. The convicted man asks that he be freed. He is met by the assertion that the law covered his conduct all the time! The formula is that the new law just clarified the jusrisdiction of the state. But jurisdiction over what? The only place in the Minnesota law that the crime of conspiracy is *defined* is in §609.175, Subd. 3, the very section that fails to condemn James Willman's conduct. How can we expand our jurisdiction over a crime that we failed to create?

It is hard to bring oneself to the conclusion that a person guilty of obviously immoral acts should go unwhipped of justice. But that is exactly what makes this case so important and so appropriate for review. It forces us to take a direct look at our fundamental assumptions. What is more important—that James Willman should serve time in prison because he is a bad man, or that the fundamental postulates of a free society

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* Common law crimes are abolished and nothing is a crime unless made so by this chapter or by other applicable statute. . . ." Minn. Stat. §609.015. " 'Crime' means conduct which is prohibited by statute . . ." Minn. Stat. §609.02 "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. §645.21.

should be maintained? It is exactly in these cases, where our wrath at some person's misbehavior collides with our belief that law, not despotism, is the only tolerable basis for society, that we are brought to the test.

Surely people should not plot to kill their wives. Just as surely, our rulers must not be free to decide after the fact what conduct shall be punishable. That was good enough, perhaps, for the sultan of Turkey and his subjects—it is not good enough for a country that strives toward a government of laws and not of men.

The common law of crimes was not out of tune with common morality. It would punish what appellant did, and its action would, in the particular instance, meet with general approval. But that common law was abolished because of a different vice —it lacked predictability. So does a criminal code that can be retroactively expanded by judges. Jeremy Bentham, in his *Rationale of Judicial Evidence*, Bk. IV, C. III, put the difficulty as vividly as only he could:

> "When a man has a dog to teach, he falls upon him and beats him: the animal takes note in his own mind of the circumstances in which he has been beaten, and the intimation thus received becomes, in the mind of the dog, a rule of common law."

As applied to human beings, he points out, this is "grievous and deplorable tyranny." So it is here. Nothing undeserved has happened to this particular appellant. But something very bad will have happened to our laws if it is declared possible in principle to make them up as we go along.

Respectfully submitted,

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APPENDIX

EXHIBIT A

No. 129 Hennepin County

JAMES WILLARD WILLMAN, Petitioner,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

Endorsed
Filed May 5, 1978
John McCarthy, Clerk
Minnesota Supreme Court

Considered and decided by the court without oral argument.

OPINION

PER CURIAM.

This is an appeal from an order of the district court denying a petition for postconviction relief from a judgment of conviction entered against petitioner in 1971 for conspiracy to commit first-degree murder.[1] Petitioner contends that his conviction was improper because the conspiracy was committed wholly within Minnesota and the conspiracy statute at the time did not cover conspiracies committed entirely within Minnesota. We affirm.

Minn. St. 1974, § 609.175, subd. 3, as it read when enacted in 1963 and when the crime in this case was committed was as follows:

[1] This court affirmed that conviction in State v. Willman, 296 Minn. 322, 208 N. W. 2d 300 (1973).

"This section applies if:

"(1) The defendant in this state conspires with another outside of this state; or

"(2) The defendant outside of this state conspires with another in this state; or

"(3) The defendant outside of this state conspires with another outside of this state and an overt act in furtherance of the conspiracy is committed within this state by either of them."

By L. 1975, c. 279, § 1, the legislature added a fourth paragraph to subd. 3, making it clear that the section also applies if "(t)he defendant in this state conspires with another in this state."

Petitioner contends that this amendment was a legislative recognition that before then one could not be convicted of a conspiracy committed entirely within Minnesota.

Recently, however, in State v. Happel, —— Minn. ——, 259 N. W. 2d 600 (1977), we considered and rejected an identical contention. As we said there, the drafters of subd. 3 had not tried to limit the application of the statute to the circumstances described but "to expand or at least clarify the jurisdiction of this state's courts over conspiracies committed in part outside Minnesota." —— Minn. ——, 259 N. W. 2d 601. That intent was envidenced by the Advisory Committee Comments to the 1963 law, 40 M.S.A. p. 182, stating the committee's opinion that it was desirable to have an explicit provision clarifying the state's jurisdiction over conspiracies committed partly outside the state. The 1975 amendment, then, was not legislative recognition of a former statutory omission and would not actually have been necessary, but was merely for reasons of clarity.

Affirmed.

EXHIBIT B

(Caption)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.

The above-entitled matter came on for hearing before the undersigned, one of the judges of the above-named Court, on June 8, 1977, pursuant to the petitioner's petition for post-conviction relief and respondent's answer thereto.

The petitioner appeared through his counsel, David W. Nord, Esq., and was personally present. The county as prosecuting authority was represented by Lee W. Barry, Esq.,

Upon all the files, records and proceedings herein, upon arguments made at the hearing, upon previous rulings of this Court, upon Chapter 590 Minnesota Statutes, and being otherwise fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

I

That on July 12, 1971, the petitioner was charged by Complaint with the crime of Conspiracy to Commit Murder in the First Degree in violation of Minn. Stat. 1967 §609.175, subd. 2(2). On August 13, 1971, the Complaint was amended to include the crime of Attempted Murder in the First Degree in violation of Minn. Stat. 1967 §609.185 and §609.17. Also, on August 19, 1971, a Preliminary Hearing was held in Hennepin County Municipal Court and petitioner was bound over to Hennepin County District Court on both counts.

II

Thereafter, on October 18, 1971, petitioner waived his right to a jury trial and the case, as to Conspiracy to Commit First Degree Murder was submitted to the undersigned, by stipulation, on all the files, records and proceedings from the Hen-

nepin County Municipal Court. Petitioner was found guilty of Conspiracy to Commit First Degree Murder by the undersigned. The evidence upon which such conviction was based indicated that the conspiracy was carried out wholly within the State of Minnesota.

III

Thereafter, on April 11, 1972, a Notice of Appeal was served on the Hennepin County Attorney. On June 8, 1973, the Minnesota Supreme Court affirmed petitioner's conviction. *State v. Willman*, 296 Minn. 322, 208 NW 2d 300 (1973).

CONCLUSIONS OF LAW

I

That Minn. Stat. 1967 §609.175 did cover, contemplate and countenance a conspiracy occurring wholly within the state of Minnesota. Minn. Stat. §609.175, subd. 3, rather than being a jurisdictional limitation expands the jurisdiction of the court to the extraterritorial acts and agreements stated. This subdivision was enacted to deal with the special jurisdictional problems of multi-state conspiracies.

II

That Minn. Stat. 1967 §609.175, subd. 3, does not limit Minn. Stat. §609.025, the general jurisdictional provision of the Criminal Code of 1963, but rather expands the court's jurisdiction to extraterritorial acts and agreements.

III

That the Amendment to Minn. Stat. §609.175, subd. 3, in the 1975, Laws 1975 c. 279 s. 1 (Minn. Stat. §609.175, subd. 3(4)), was not a legislative indication that such conspiracies were not formerly covered, contemplated or countenanced. The amendment's purpose was one of clarification. This amendment did not change the prior substantive law of conspiracies, but only made explicit to conspiracies the jurisdictional bases contained in Minn. Stat. §609.025.

ORDER

IT IS THEREFORE ORDERED:

I

That the petitioner's petition for post conviction relief is hereby denied and dismissed in all respects.

II

That the Clerk of this Court shall send certified copies of this Order to James Willard Willman, Minnesota State Prison, Stillwater, Minnesota; Lee W. Barry, Esq., Assistant Hennepin County Attorney; David W. Nord, Esq., 1170 Northern Federal Building, St. Paul, Minnesota, 55102; and Warren Spannaus, Esq., Attorney General, State of Minnesota, State Capitol, St. Paul, Minnesota, 55101.

By the Court:

STANLEY D. KANE

Judge

Dated: July 29th, 1977

EXHIBIT C

296 Minnesota Reports 322

STATE v. JAMES WILLARD WILLMAN.

208 N.W.2d 300.

June 8, 1973—No. 43688.

Criminal law—conviction of conspiracy—sufficiency of evidence—necessity of overt act.

Appeal by James Willard Willman from a judgment of the Hennepin County District Court, Stanley D. Kane, Judge, whereby he was convicted of conspiracy to commit murder in the first degree. Affirmed.

C. Paul Jones, State Public Defender, and *Mollie G. Raskind*, Assistant State Public Defender, for appellant.

Warren Spannaus, Attorney General, *George M. Scott*,

County Atorney, *Theodore R. Rix, Vernon E. Bergstrom,* and *Michael McGlennen,* Assistant County Attorneys, for respondent.

Heard before Knutson, C. J., and Peterson, Todd, and MacLaughlin, J.J.

PER CURIAM.

Defendant, challenging the sufficiency of the evidence, appeals from a judgment of conviction of conspiracy to commit murder in the first degree, Minn. St. 609.175, subd. 2. We affirm.

The evidence, viewed in the light most favorable to the verdict of guilty, discloses that on July 7, 1971, defendant secured the agreement of one Anderson Toles to kill defendant's wife in return for $2,000 in cash, and then, with Toles, formulated a detailed plan for the commission of the crime. This plan specified that on the afternoon of July 9, 1971, defendant would drive Toles to the parking lot of his wife's apartment building where Toles would wait her expected return, stab her as she emerged from her automobile, and then escape with the aid of a "pick-up man" driving another automobile. While Toles was awaiting defendant's wife's return, defendant was to drive back to his place of employment and establish an alibi. So that Toles would be able to identify the intended victim, defendant gave him a photograph of her and wrote down the license number of her car on a map he had drawn.

After this meeting and after drinking a bottle of wine that defendant had purchased for him, Toles decided that he couldn't go through with the plan and contacted the police. In response to a police request he agreed to meet with defendant as planned on July 9.

On that day, defendant picked up Toles at the scheduled time and gave him $1,300 in cash, agreeing to pay the rest at

$50 per week. Defendant then drove Toles to the vicinity of the planned crime and dropped him off. Moments later police who had covered the area stopped defendant and arrested him.

We believe that this evidence was sufficient to permit the trial court, acting as trier of fact, to find that defendant was guilty as charged. A defendant is guilty of conspiracy to commit first-degree murder if he conspires with one or more other persons to commit first-degree murder and if either he or one of his co-conspirators committed some overt act in furtherance of the conspiracy. Minn. St. 609.175, subd. 2. Here, contrary to defendant's contention on appeal, there was evidence that Toles not only communicated to defendant his agreement with the plan but actually intended to go through with it. Therefore, there was sufficient evidence that defendant conspired with at least one other person to commit first-degree murder.

Additionally, we believe that defendant's actions in formulating the detailed plan with Toles and in giving Toles the photograph and the map were overt acts in furtherance of the conspiracy. It is true that a short time later Toles changed his mind and decided against going through with the plan. But this change of mind on Toles' part did not negate the criminality of defendant's conduct. Once defendant had committed the overt acts in furtherance of the conspiracy, the crime of conspiracy was complete, notwithstanding Toles' subsequent change of mind. See, State v. Baynes, 279 Minn. 423, 157 N. W. 2d 371 (1968).

Affirmed.

EXHIBIT D

(Caption)

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the

District Court within and for the County of Hennepin be and the same hereby is in all things affirmed

Dated and signed May 19, 1978

By the Court

Attest: John McCarthy

Clerk

EXHIBIT E

(Caption)

ANSWER TO MOTION OF RESPONDENT

In its Motion and Memorandum, the respondent says that *State v. Happel* is "wholly dispositive of the present case." This is not quite true. In this case two points are raised:

1. Is the statute intended to cover conspiracies committed wholly within Minnesota?

2. If so construed, does the statutes violate the constitutions of Minnesota and the United States?

The first of these questions is answered adversely to the appellant by *Happel*. The second question has not yet been answered.

It remains for the Court to say what the answer to the second question is. It would appear that the appropriate order to issue from this Rule 133 proceeding would be an order limiting the issues to the question of constitutionality.

Dated this 10th day of November, 1977.

Respectfully submitted,

DAVID W. NORD

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Telephone (612) 224-3361

EXHIBIT F

State of Minnesota

County of Ramsey—ss.

Gary L. Greenberg, being first duly sworn on oath deposes and says that he served the attached Notice of Appeal upon Gary Flakne, Hennepin County Attonrey, 300 South 6th Street, Minneapolis, and Warren Spannaus, Attorney General, State of Minnesota, 820 American Center Building, St. Paul, Minnesota 55105, and the Hennepin District Court, Criminal Department, 300 South 6th Street, Minneapolis, Minnesota 55487, by placing a true and correct copy of said Notice of Appeal in an envelope addressed to the above mentioned persons, and by placing said envelope and contents in the United States mail at Saint Paul, Minnesota, postage prepaid. Said service was made on the 11th day of August, 1978 A.D.

GARY L. GREENBERG

Subscribed and sworn to before me this 11th day of August, 1978. A.D. Barbara A. J. Wellmer, Notary Public, Ramsey County, Minnesota. My commission expires Jan. 17, 1979. (Seal)

IN THE SUPREME COURT OF THE STATE OF MINNESOTA

JAMES W. WILLMAN,

Petitioner-Appellant,

vs.

STATE OF MINNESOTA,

Respondent-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that JAMES W. WILLMAN, appellant above named, hereby appeals to the Minnesota Supreme Court of the United States from the final order of the Minnesota Supreme Court denying the petition for post conviction relief, entered herein on May, 1978.

This appeal is taken pursuant to 28 U.S.C. Sect. 1257(2) and alternately 28 U.S.C. Sect. 2103.

Appellant was convicted of the crime of conspiracy to commit first degree murder in violation of Minnesota Statute Sect. 609.175; was sentenced to 0 to 10 years confinement and is not now in custody, having been released.

II. Question on Appeal

In a state which has abolished common-law crimes, so that no act or omission is a crime except as made so by statute, may the courts, consistently with due process of law, so "construe" a criminal statute as to make it cover a case inadvertently omitted from the law by the legislature?

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[This Notice of Appeal was filed with the Hennepin County District Court on August 11, 1978.]